IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1989

ERNEST SIMON, ET AL, *Petitioners*

v.

ESTATE OF W. P. ALLEN, DECEASED, ET AL, *Respondents*

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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MEMORANDUM FOR FIRST CITY NATIONAL BANK IN OPPOSITION

INTRODUCTION

Respondent has foregone any statement here of "Questions Presented." Indeed, we do not believe any of the "questions presented" in the Petition are genuinely raised by the record in this case. Any attempt to restate the questions in terms we consider justified by the factual record would necessarily produce questions quite different from those Petitioners intended to bring here.

STATEMENT OF FACTS

A statement of the facts in this case must be made by the Respondent, First City National Bank, because it does not agree with Petitioner's statement.

A. HISTORY OF THE PARTIES AND THE RELATIONSHIPS

Allen was a successful cotton spot broker who had operated Allen & Company, a sole proprietorship, for over thirty (30) years as the means for conducting his business (S.F. 15-16).

Since 1939, Allen had done business with Respondent, First City National Bank,[1] through Henry Oliver,[2] who at the time involved in this lawsuit was a Senior Vice President of First City with general supervision of all cotton loans handled by that institution (S.F. 17, 9).

Behring & Behring was a firm operated primarily by Melvin A. Behring[3] (S.F. 143). It operated as a cotton merchant, one who buys and sells cotton (S.F. 17). Moreover, Behring & Behring was the owner of a number of cotton warehouses (S.F. 18).

Allen, since 1960, had been engaged in inventory financing for Behring & Behring, backed by money loaned by First City (S.F. 20). Allen pledged the warehouse receipts from Behring as collateral to secure loans obtained in order to finance Behring & Behring. As the cotton represented by the warehouse receipts was sold, First City, under authority of a bill of lading addressed to a third

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1. Hereafter referred to as First City.
2. Hereafter referred to as Oliver.
3. Hereafter referred to as Behring.

party, would release the appropriate warehouse receipt, held by the Bank as collateral (S.F. 30, 40).

Cohn & Company acted, like Behring & Behring, as a cotton merchant (S.F. 21). Its principal stockholder and spokesman was Ernest Simon. First City also financed Simon's cotton operation. This relationship was specifically based upon the individual guaranty of Ernest Simon for the obligations of Cohn & Company in the amount of TWO MILLION DOLLARS ($2,000,000.00), to First City (S.F. 93-96). Cohn & Company also engaged in financing Behring & Behring (S.F. 346).

Simon and Behring disguised their financing scheme as a sale from Behring to Simon, back to Behring, or to a third party, Toyo Cotton Co. Thus what appeared to be sales from a cotton merchant to an exporter or other cotton merchant was in actuality a financing arrangement for the benefit of Behring. Such facts, had they been known would, of course, have affected the decision of First City concerning how much to lend Cohn & Company, inasmuch as such a financing transaction tended to increase the liability of Cohn & Company over and above the amount they owed as evidenced by their notes. Oliver did not know at that time that it was a financing arrangement (S.F. 29-40, 263-266).

B. THE DEMISE OF BEHRING & BEHRING

Behring & Behring encountered serious financial difficulties.

1. Behring & Behring's Relationship with Simon During this Period

Following an extended summer vacation in 1966, Simon returned to Cohn & Company and resumed financ-

ing operations (S.F. 828). These operations had been temporarily suspended during Simon's vacation because Cohn & Company was essentially a one-man operation, owned and controlled by Simon. The circumstances surrounding the new series of financing for Behring & Behring strongly indicated to Simon that something was wrong.

There was a marked increase in the turnover of warehouse receipts plus an increase in the amounts of money involved, as well as an increase in the frequency of the transactions (S.F. 829, 850). In August 1966, Simon requested a financial statement from Behring & Behring. The financial statements sent in response to his request were non-certified and over a year old—covering only that period up to May 1965, and had not been audited by an independent third party (S.F. 830). Even these inadequate financial statements revealed a company operating with very little equity and inflated values of certain listed assets (S.F. 830).

Petitioner's accountant, after learning of these revelations, suggested that multiple financing might be occurring, i.e., the same warehouse receipts might be returned by Behring to Cohn & Company more than once for financing (S.F. 831). This was made possible by the fact that Simon would often "sell" warehouse receipts back to Behring rather than third parties. An investigation by Simon and his accountant, for the receipt numbers revealed that it was not unusual for the same bale of cotton to come back for financing more than once and sometimes as much as three times (S.F. 832).

As early as August 1966, Simon's accountant suggested going to the warehouse to see if the cotton was actually in storage. Simon chose instead to call Behring, who prom-

ised to slow down the volume of transactions (S.F. 833, 872).

Finally, a draft drawn by Cohn & Company on Behring & Behring for $250,142.61, which was deposited to Cohn & Company's account at First City on September 7th, was dishonored (S.F. 45). On September 8, 1966, Simon deposited in Cohn & Company's account at First City a second draft on Behring & Behring for $276,096.88. This draft was likewise dishonored, making a total of over $526,000.00 in drafts that had been dishonored by Behring & Behring in a period of two days (S.F. 45, 124).

On Sunday, September 11, 1966, Simon flew to Dallas in an attempt to get the debt that was evidenced by the drafts reduced to notes and obtain additional collateral (S.F. 451). This was done in spite of the fact that warehouse receipts stood behind the drafts as collateral for their "financing" (S.F. 457). Two days later Cohn & Company sold to Allen these same warehouse receipts about which Simon, justifiably felt so insecure.

2. Behring & Behring's Relationship with Allen

a. Prior to the Meeting of September 13, 1966

Allen & Company had no series of warnings as did Simon and Cohn & Company. The first mention of their relationship came on September 9, 1966, five days before the sale between Simon and Allen. On that day Allen requested First City to extend credit through Allen & Company for the approximate amount of $1,000,000.00 to cover the financing of 10,000 bales of cotton which Behring represented had been sold (S.F. 48-49).

Between September 9 and September 13, 1966, four or five checks of Behring & Bethring totaling some $550,000.00 which Allen & Company had deposited in its account at First City were returned because of insufficient funds. Since Allen & Company had received immediate credit for these checks, they were charged back against the Allen & Company account. Upon notification Allen requested an immediate meeting with Behring concerning it (S.F. 49).

b. The Meeting of September 13, 1966

On the afternoon of September 13, a meeting was held in Oliver's office. Present at the meeting were Allen, Oliver, Behring, and Mr. Stockbridge, Allen's office manager (S.F. 49).

Behring brought $17,000.00- $18,000.00 worth of stock in State General Insurance Company of Dallas, two memberships in The Dallas Cotton Exchange and two or three cases of single bale receipts, which he represented would be sufficient collateral to secure the $550,000.00 (S.F. 51).

Following further conversation between Behring and Allen, Allen & Company agreed to purchase the warehouse receipts which were attached to Cohn & Company's drafts on Behring & Behring which had been dishonored. Allen further agreed to purchase another group of warehouse receipts covering an additional 3,775 bales of cotton with an invoice value of $343,052.74, which was the balance of the cotton Cohn & Company held from Behring & Behring (S.F. 53-54). As a result of these decisions, Allen borrowed $1,245,324.54 from First City.

C. THE SALE AND SUBSEQUENT EVENTS

On September 14, 1966, the same day that First City credited Allen & Company's account in the amount of $1,245,324.54, two large checks were written on that account made made payable to Cohn & Company (S.F. 106). The checks were in the amount of $526,377.61, for the warehouse receipt attached to the unpaid drafts, and $343,959.19, for the balance of the Behring & Behring cotton held by Cohn & Company (S.F. 106).

1. The Actions of Simon Following the Sale

On the same day Allen & Company's checks were written, deposits were made in the Cohn & Company account for $526,377.61, and the following day another deposit was made in the amount of $343,959.19 (S.F. 120-121). Immediately thereafter there was a withdrawal of $576,707.89, the amount of the returned drafts.

Since the bank gave immediate credit to Cohn & Company upon the deposit of the Behring & Behring drafts in question, the bank charged Cohn & Company's account for the amounts of said drafts when they were returned unpaid (S.F. 125). This charge against the Cohn & Company account created an overdraft in said account since Cohn & Company had withdrawn the credit created by the deposit of the drafts. The overdraft was paid by the deposit of the funds from Allen & Company (S.F. 130).

On September 15, 1966, two additional withdrawals were made from Cohn & Company's account. The first was for $58,300.00 the amount of the promissory note that Cohn & Company owed to First City (S.F. 132). Other large withdrawals were made between September 15, 1966 through September 21, 1966, totaling $272,-

000.00. During this same period, September 15, 1966 through September 21, 1966, a series of deposits totaling $267,850.00 were made into the individual accounts of Ernest and Vera Simon (S.F. 132-134, 137).

Two or three weeks after the sales transaction, block receipts—representing 2,400 bales of cotton that were "blocked" for delivery—were found that had been issued in the name of Cohn & Company (S.F. 57). These blocked bales were now a part of Allen & Company's collateral. Consequently, it was felt necessary that the blocked receipts be endorsed by Cohn & Company so that they could be sent to the warehouse and be reissued in the name of Allen & Company (S.F. 58).

Simon, when presented with the receipts, called Oliver to ask why he had to endorse them. Upon explanation, he asked if by signing the receipts he was guaranteeing the existence of the cotton (S.F. 59). Even though his attitude was that he did not wish to endorse the receipts, he finally did so and they were returned to First City.

2. The Actions of Allen Following the Sale

On November 4, 1966, Allen called Oliver to report that he had just received a phone call from Behring. Behring wanted Allen to come to Dallas to see him. In Dallas, Allen discovered that the majority of the receipts were worthless (S.F. 61-62, 64).

3. Related Events

In December of 1966, Allen killed himself. Subsequently Behring & Behring was placed in bankruptcy.

Mrs. Allen, independent executrix of the Estate of W. P. Allen, and First City filed suit against Cohn &

Company and Simon, individually, seeking to recover their loss. Prior to the trial hereof Cohn & Company ceased to transact business, and Simon commenced to reside in Switzerland. Simon did not personally appear at the trial.

D. TRIAL RESULTS

After a lengthy trial before a jury, a verdict was returned. The jury verdict was supported by substantial evidence, therefore, the trial court entered a judgment that the Estate of Allen and First City recover from Cohn & Company, Simon and Behring, jointly and severally, the sum of $475,078.03, plus interest; that the Estate of Allen recover from Cohn & Company, Simon and Behring, jointly and severally, the further sum of $203,-550.28, plus interest; that the Estate of Allen recover from Behring the further sum of $412,248.26, plus interest; that the Estate of Allen recover from Simon $1.00 as exemplary damages; and that the Estate of Allen and First City recover from Cohn & Company, Simon and Behring, jointly and severally, all costs of court.

The Texas Court of Civil Appeals affirmed the trial court. 497 S.W.2d 800 (Tex. Civ. App.—Waco, Ref. N.R.E.). The Supreme Court of Texas refused to grant a writ of error, stating there was no reversible error.

REASONS FOR DENYING THE WRIT

I. FAILURE TO RAISE ISSUE BELOW

Petitioners, Cohn & Company and Ernest Simon, seek review of a decision of the Texas Court of Civil Appeals affirming a trial court verdict rendering Petitioners

liable to this Respondent, First City National Bank, in the amount of $475,078.03.

None of the five points of error cited by Petitioners in support of their application for this Writ of Certiorari were raised as error on Motion for New Trial; in the Texas Court of Civil Appeals; on Motion for Rehearing to the Texas Court of Civil Appeals; or on Application for Writ of Error to the Supreme Court of Texas. Consequently, the constitutional arguments have been waived under provisions of the Texas Rules of Civil Procedure, T.R.C.P. Rule 469 and Rule 374 (Appendix B), p. 20-23). This court has consistently refused to grant certiorari on issues not raised in the lower courts, but raised on appeal for the first time. *Crowell v. Randell,* 35 U.S. (10 Peters) 368 (1836); *Tacon v. Arizona,* 410 U.S. 351 (1973); *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

Cardinale v. Louisiana, supra, was a case in which the Petitioner sought appellate review under one of the same statutes as this Petitioner, Title 28, Section 1257(3) United States Code. In refusing to rule on Petitioner's error, Mr. Justice White said:

> " . . . It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368,

> 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court . . ." *Id.*, 438

Having failed to submit special issues at trial concerning whether this particular transaction involving the warehouse receipts was a sale, Petitioners have waived the right to challenge the fact of sale on appeal. T.R. C.P. 279, (App. B), and *Allen v. Williams,* 380 S.W.2d 718 (Tex. Civ. App.—Waco 1964, No Writ). It is basic in our system of jurisprudence that all issues complained of as error on appeal must have been raised at trial.

II. THE JUDGMENT OF THE STATE COURTS COMPLIED WITH THE REQUIREMENTS OF DUE PROCESS OF LAW

Petitioner, after availing himself of every judicial procedure allowed in the State of Texas in defense of this case, now complains that he was denied due process. Petitioner would have this court believe that "any badge of infamy" attached to a citizen consititutes a denial of due process where the stigma results from State action. In support of this concept, Petitioner cites cases not similar to the case at bar. The "badge of infamy" quoted in *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971), was applied without affording the individual a hearing. *Id.,* 436-437. It is difficult to understand how that case pertains to Petitioner's position in this particular case inasmuch as Petitioner was afforded a jury trial and numerous appellate reviews. Not one scintilla of evidence has been submitted by Petitioner to demonstrate a denial of due process.

In support of his contention of denial of due process, Petitioner cites *Twining v. New Jersey,* 211 U.S. 78, obviously confusing the intended purpose of due process of law with the elements required to provide due process. Mr. Justice Moody, delivering the majority opinion in *Twining v. New Jersey, supra,* 112, cites *Rogers v. Peck,* 199 U.S. 435, making it abundantly clear that this Petitioner has been afforded due process:

> "Due process of law, guaranteed by the Fourteenth Amendment, does not require the state to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and adequate opportunity to defend himself in the prosecution."

Surely Petitioner is not alleging lack of either notice or of an opportunity to defend himself. The trial of this case was reset numerous times in an effort to get Petitioner to return from Switzerland and appear at the trial. When the trial was finally held the Petitioner refused to return to Texas for the trial, but he was represented by two able and respected attorneys of his selection.

Citing *Manley v. Georgia,* 279 U.S. 1 (1928), Petitioner contends he has been wronged in a similar manner. *Manley, supra,* did not find the Georgia statute defective because it allowed a presumption of fraud based on the existence of specific facts. Rather, the defect in the statute was its failure to limit the presumption of fraud to specific situations demonstating acts of ommission or commission of the accused which tended to show his responsibility, *Id.,* 6-7. Whereas here, the jury finding that Petitioner acted in bad faith was based on evidence establishing that Petitioner was aware at the time of the sale

of the multiple invoicing of the warehouse receipts; he was aware of the non-existence of a profit margin by Behring; he was aware Behring's financial statement was inadequate; he was aware that both a lawyer and his accountant had advised him to check on the existence of the cotton; he was aware of enough facts and filled with enough doubt that following the sale he inquired as to whether or not his signing of the receipts guaranteed the existence of the cotton.

The trial of this case lasted nearly two weeks. After hearing the evidence a jury determined the questions of fact concerning the existence of a sale between the parties and specifically found that:

(1) There was a sale; [Special Issue (1-4)]

(2) Cohn & Company and Simon failed to disclose facts material to the transaction; [Special Issue (14), (15), (16) and (17)]

(3) Cohn & Company and Simon acted in bad faith; [Special Issue 13)]

(4) The parties were at least operating under a mutual mistake of fact as to the existence of the cotton; [Special Issue (30), (31)]

(5) Simon had induced the bank to rely on his guaranty giving rise to the principle of promissory estoppel [Special Issue findings (32), (33) and (34)]

Each of these findings would be sufficient by itself to support the judgment of the courts below.

Petitioner claims that he was merely performing a simple clerical act of transferring paper and he has been wronged by the arbitrary actions of a trial court, a jury,

and two appellate courts. The great weight of evidence is to the contrary. Consequently, Petitioner's contention should be recognized as having no merit.

III. THE DECISION OF THE TRIAL COURT DOES NOT INVOLVE ANY FEDERAL QUESTION AFFECTING INTERSTATE COMMERCE

In a desperate bid to delay further the enforcement of this judgment, Petitioners seek to manufacturer a federal question worthy of review by asserting that the warranties imposed upon the seller of documents of title under the Uniform Commercial Code, Section 7.507, will have a detrimental impact on interstate commerce and on the effectiveness of the Uniform Commercial Code in facilitating such commerce. Respondents maintain the facts of this case do not present such a federal question. Moreover, it is difficult to imagine a situation having a greater detrimental effect on interstate commerce than to allow an individual to sell warehouse receipts, representing goods in interstate commerce, knowing at the time of sale that the goods represented by such receipts might not exist; not communicating these suspicions to the buyer; and then allowing the seller to escape all responsibility for his deceit.

The trial court in finding Petitioner liable to the Respondent in the amount of $475,078.03, was attempting to return each party to the position he occupied prior to the sale. The evidence of mutual mistake concerning the existence of the cotton as represented by the warehouse receipts was quoted by the Court of Civil Appeals in its opinion and found to be sufficient to support the verdict in favor of Respondent. *Estate of Allen v. Simon,*

497 S.W.2d 800, 804. Likewise, the presumption of the making of warranties from the selling of cotton by the Petitioner. A statute is not arbitrary because it provides that a seller warrants, unless he provides to the contrary, that:

(1) The transfer is *rightful and fully effective with respect to the title* to the document *and the goods* it represents. (UCC, § 7.507(3)). (App. A)

(2) . . . the goods shall be merchantible . . .(UCC, § 2.314 (a)). (App. A)

(3) the goods should conform to the description of the goods which is made a part of the basis of the bargain. (UCC, § 2.313(a)(2)). (App. A)

After the trial, Petitioners manufactured the allegation that the transaction between Cohn & Company and Allen was not a sale but merely a financing scheme. Respondents submitted their theory of the case to the jury, Petitioners did not. Consequently, Petitioner's assertions on appeal, that the transaction was other than a sale, are totally without support in the pleadings, the evidence or in any findings of the jury.

Cohn & Company entered into a sale a transaction whereby Allen gave Cohn & Company valuable consideration for non-existent cotton. Allen did so because he believed and trusted Behring and Simon and did not know nor suspect that the warehouse receipts he received were not backed by cotton in storage. On the other hand, Cohn & Company, through Simon, had knowledge of material facts which Simon failed to disclose to Allen, as was his duty. First City, therefore, contended and the jury found that Simon was guilty of bad faith and fraud.

First City further contended and the jury found that if Simon had no actual knowledge of the absence of the cotton and innocently assumed that the warehouse receipts in question represented cotton in storage, then he was mistaken as to a fact sufficient to void the transaction between Cohn & Company and Allen on September 14, 1966.

There can be no doubt that there is ample evidence to support the findings of the jury and judgment of the trial court, and that the legal theories applied by the trial court, and the Texas Court of Civil Appeals are reasonable and authorized by law in cases of this nature.

CONCLUSION

The Constitution is not violated by this case. Only by further delay can an injustice be done. Consequently, for all the reasons set forth above, the Petitioners' Application for Writ of Certiorari should be refused.

Respectfully submitted,

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APPENDIX A

STATUTES

V.T.C.A. Tex. Bus. & Com.

§ 2.313. Express Warranties by Affirmation, Promise, Description, Sample

(a) Express warranties by the seller are created as follows:

(1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(b) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. (50th Legis., Ch. 721, Sec. 2-313.) Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

§ 2.314. Implied Warranty: Merchantability; Usage of Trade.

(a) Unless excluded or modified (Section 2.316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section

the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(b) Goods to be merchantable must be at least such as

(1) pass without objection in the trade under the contract description; and

(2) in the case of fungible goods, are of fair average quality within the description; and

(3) are fit for the ordinary purposes for which such goods are used; and

(4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved, and

(5) are adequately contained, packaged, and labeled as the agreement may require; and

(6) conform to the promises or affirmations of fact made on the contained or liable if any.

(c) Unless excluded or modified (Section 2.216) other implied warranties may arise from course of dealing or usage of trade. (59th Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

§ 7.507. Warranties on Negotiation or Transfer of Receipt or Bill.

Where a person negotiates or transfers a document of title for value otherwise than as a mere intermediary under the next following section, then unless otherwise agreed he warrants to his immediate purchaser only in addition to any warranty made in selling the goods

(1) that the document is genuine; and

(2) that he has no knowledge of any fact which would impair its validity or worth; and

(3) that his negotiation or transfer is rightful and fully effective with respect to the title to the document and the goods it represents.

APPENDIX B

TEXAS RULES OF CIVIL PROCEDURE

Rule 279. Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that the objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence

and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

Rule 374. Assignments of Error

The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required shall be considered as waived. Complaint of the action of the court on all matters arising under the circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary. Amended by order of March 31, 1941, effective Sept. 1, 1941.

Rule 469. Requisites of Application

The fact that the docket of the Supreme Court is overcrowded makes it imperative that applications for writs of error be as brief as possible. The attorneys are urged to cooperate with the Court in this respect in order to reduce the work of the Court. The respondent is urged to file a reply.

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." The application shall contain the following:

(a) Statement of the Case. The opinion of the Court of Civil Appeals will always be read before the application is considered; consequently the application should not contain matter that is found in the opinion of the Court of Civil Appeals. Ordinarily it should contain only a statement of the general nature of the suit,—for instance, whether it is a suit for damages, on a note, or in trespass to try title, and that the statement as contained in the opinion of the Court of Civil Appeals is correct, except in the particulars pointed out. Example: "This is a suit for damages in excess of $1000.00 for personal injuries growing out of an automobile collision. The opinion of the Court of Civil Appeals correctly states the nature and result of the suit, except in the following particulars: (If any.)" Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the points to which they are pertinent.

(b) Statement of Jurisdiction. Except in those cases in which the jurisdiction of the Court depends on a con-

flict of decisions under Subdivision 2 of Article 1728, the petition should merely state that the Supreme Court has jurisdiction under a particular subdivision of Article 1728. Example: "The Supreme Court has jurisdiction of this suit under Subdivision 6 of Article 1728." Where jurisdiction of the Supreme Court depends on a conflict of decisions, the conflict on the question of law should be clearly and plainly stated.

(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

(d) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the Court of Civil Appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

(e) Subject Index. The application shall contain at the front thereof a subject index with page references where the discussion of each point relied upon may be found and also a list of authorities alphabetically arranged,

together with reference to the pages of the application where the same are cited.

(f) If any brief or application for writ of error is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn. Amended by Order of March 31, 1941, effective September 1, 1941; by order of September 20, 1941, effective December 31, 1941, and by order of April 12, 1962, effective September 1, 1962.